Nos. 93-629 and 93-631

In the Supreme Court of the United States

OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS CORPORATION, PETITIONER

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTION PRESENTED

Whether Section 203(b)(2) of the Communications Act of 1934, 47 U.S.C. 203(b)(2) (Supp. III 1991), which authorizes the Federal Communications Commission to "modify any requirement" of Section 203, permits the Commission to make Section 203(a)'s tariff-filing requirement optional for telephone companies lacking market power.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-356

MCI TELECOMMUNICATIONS CORPORATION, PETITIONER

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY

No. 93-521

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The order of the court of appeals (93-356 Pet. App. 1a-2a) is unreported. The report and order of the Federal Communications Commission (93-356 Pet. App. 3a-36a) is reported at 7 F.C.C. Rcd. 8072. A prior

decision that the court of appeals found controlling (93-356 Pet. App. 37a-56a) is reported at 978 F.2d 727.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1993. The petition for a writ of certiorari in No. 93-356 was filed on September 2, 1993. On August 24, 1993, the Chief Justice granted the federal petitioners' request for an extension of time to file a petition for a writ of certiorari to and including October 2, 1993, and the petition in No. 93-521 was filed on October 1, 1993. On November 29, 1993, the Court granted the petitions and consolidated the cases. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 203 of the Communications Act of 1934, 47 U.S.C. 203 (1988 & Supp. III 1991), provides:

> **(a) Filing; public display**
>
> Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such

schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance

with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges of facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

STATEMENT

1. Section 203(a) of the Communications Act of 1934, 47 U.S.C. 203(a), provides that telephone companies "shall * * * file" tariff schedules listing the interstate services they offer and the rates they

charge for those services. Section 203(b)(2) authorizes the Federal Communications Commission, "in its discretion and for good cause shown," to "modify any requirement" of Section 203. In the rulemaking order at issue here, the FCC modified the tariff-filing requirement of Section 203(a) by codifying previous orders permitting "non-dominant" telephone companies (those without market power) to offer interstate service without filing tariffs. Under this "permissive detariffing" policy, long distance companies other than AT&T (which has a 60% share of that market, 93-356 Pet. App. 31a) are relieved of the burdensome tariff-filing requirement. Local exchange carriers, which retain bottleneck control over local telephone service and thus over access to interstate long distance service, must continue to file interstate access tariffs.

The Commission's permissive detariffing policy was a response to the introduction of competition in the long distance market in the 1970s. When Congress passed the Communications Act in 1934, AT&T had a monopoly on the provision of long distance telephone service in the United States. See S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934) ("[t]his vast monopoly which so immediately serves the needs of the people in their daily and social life must be effectively regulated"). That monopoly persisted until technological advances and policy decisions by the FCC permitted the entry of new competitors to the marketplace for long distance telephone services.

In a series of orders beginning in 1979 in the *Competitive Carrier* rulemaking proceeding, *Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C.2d 308 (1979), the FCC began to adopt rules reducing, in

increments, the requirements imposed on telephone companies lacking market power. By reducing the regulatory burden imposed on carriers with small market shares, the FCC hoped to encourage entry into the telecommunications market and vigorous competition among those who entered. The Commission believed that reducing the regulatory burden was feasible because the forces of competition would effectively preclude non-dominant carriers from charging unjust and unreasonable rates in violation of Section 201(b) of the Act, or discriminating unreasonably in violation of Section 202(a) of the Act. See 77 F.C.C.2d at 334-338.

By 1983, the Commission had relieved most non-dominant carriers, such as MCI Telecommunications Corporation and US Sprint Communications Company, of the general obligation to file tariffs. See *Fourth Report and Order*, 95 F.C.C.2d 554 (1983). Non-dominant carriers nonetheless remained (and still remain) subject to the substantive requirements of Title II that their rates be just and reasonable and not unreasonably discriminatory. The approach adopted in the FCC's *Fourth Report* was called "permissive detariffing" because non-dominant carriers were permitted, but not required, to forbear from filing tariffs. The *Fourth Report* was not challenged on judicial review.

A subsequent order in the *Competitive Carrier* proceeding made the detariffing of non-dominant carriers mandatory: Under the rules adopted in that order, such carriers no longer were *permitted* to file tariffs with the FCC. See *Sixth Report and Order*, 99 F.C.C. 2d 1020 (1985). MCI challenged the *Sixth Report* in the D.C. Circuit, contending that it had the

right under Section 203(a) to file tariffs. MCI won a ruling that the FCC lacks authority "to prohibit MCI and similarly situated common carriers from filing tariffs." *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186, 1188 (1985). In the 1985 decision invalidating mandatory detariffing, the D.C. Circuit declined to reach the question "whether the FCC's earlier permissive orders are invalid." *Id.* at 1196.

2. In 1989, AT&T initiated an administrative complaint proceeding against MCI. AT&T's complaint to the FCC alleged that MCI was providing interstate common carrier services to some customers without having filed tariffs with the Commission, in violation of Section 203. AT&T thus challenged the FCC's permissive detariffing policy, despite having previously defended permissive detariffing before the FCC and in court. See *Sixth Report and Order*, 99 F.C.C.2d at 1027; Br. for Intervenor AT&T Information Systems Inc. at 41-42, *MCI Telecommunications Corp.* v. *FCC*, 799 F.2d 773 (D.C. Cir. 1986) (Table) (No. 84-1402).

The Commission denied AT&T's complaint insofar as AT&T sought damages for MCI's failure to file tariffs in the past. The Commission concluded that "it would be manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, which the Commission explicitly approved in advance, may give rise to a finding of liability." 93-356 Pet. App. 64a. The Commission dismissed AT&T's complaint insofar as it sought injunctive relief, concluding that "rulemaking proceedings are more appropriate for considering general rules of widespread applicability." *Id.* at 65a. Accordingly, the Commission simultaneously initiated a rulemaking proceeding, with an

expedited pleading cycle, to consider whether its permissive detariffing rules should be modified or repealed. AT&T appealed the denial of its complaint while the rulemaking proceeding went forward.

3. The Commission released its *Rulemaking Order*—the decision at issue in this case—in November 1992. The Commission retained the permissive detariffing rules and set forth a comprehensive analysis of the Commission's basis for those rules. 93-356 Pet. App. 3a-33a. The Commission acknowledged that Section 203(a) requires telephone companies to file tariffs and that Section 203(c) prohibits them from offering service without having filed tariffs. But the Commission also found that Congress had intended the agency to have flexibility under the statute to carry out its mandate under 47 U.S.C. 151 "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." See 93-356 Pet. App. 12a-21a. More specifically, the Commission emphasized that "under Section 203(b)(2) the Commission is granted equally explicit authority to 'modify *any requirement*'—save one—'made by or under authority of this section.'" 93-356 Pet. App. 13a. The Commission noted that "this section" refers to Section 203, and concluded that this modification power may be employed "to alter the tariff filing requirements of both subsections (a) and (c) of Section 203." 93-356 Pet. App. at 14a.

The Commission found further support for its reading of Section 203(b)(2) in the language of Section 203(c), which prohibits "providing service without a tariff * * * '*unless otherwise provided* by or *under*

authority of this Act.'" 93-356 Pet. App. 14a. The Commission concluded that Section 203(c) makes clear that Congress contemplated that service might be provided without a tariff in some instances where the Commission had authorized such service. *Ibid.*

The Commission also noted that Congress was well aware of its permissive detariffing policy, which by then had been in effect for more than ten years. 93-356 Pet. App. 23a. Rather than disapproving the policy, Congress in 1990 amended the Communications Act to require "operator service providers" (which include common carriers such as MCI and Sprint) to file tariffs covering their operator services, "while leaving the existing regulatory baseline intact." *Ibid.*; see 47 U.S.C. 226(h)(1)(A) (Supp. III 1991). Because that amendment—part of the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA)—was "predicated upon a baseline of forbearance," the Commission found that TOCSIA supported its interpretation of the extent of the authority granted by the provision authorizing it to "modify any requirement" in Section 203.

Furthermore, after reviewing nearly ten years of experience with the permissive detariffing rules, the Commission concluded that those rules had encouraged competition in the market for long distance services and had increased customer choice with respect to carriers, services, and prices. 93-356 Pet. App. 26a-31a. Specifically, the Commission noted that "[i]n 1982, appproximately a dozen long distance carriers operated within the United States," while "[b]y March 1992, there were an estimated 482 such carriers purchasing switched access from local exchange carriers." *Id.* at 30a. The Commission also

found that "the record here confirms that but for permissive detariffing, at least some of the current telecommunications market participants likely would not have entered into the competitive fray at all." *Id.* at 29a. The rules thus served the Commission's mandate to make available efficient telecommunications services, while still allowing the agency to retain its ability to enforce the substantive rate-making provisions of the Act.

4. On November 13, 1992—eight days after the FCC announced the completion of the expedited rule-making proceeding but 12 days before the Commission released its opinion—the D.C. Circuit issued its judgment on AT&T's petition for review of the Commission's action on AT&T's complaint against MCI. The court first decided that the Commission had abused its discretion by failing to resolve AT&T's challenge to permissive detariffing in that adjudicatory proceeding. 93-356 Pet. App. 44a-51a. The court then proceeded to consider the merits of the permissive detariffing rules established by the FCC. Although it was the mandatory detariffing policy established by the FCC's *Sixth Report* that had been at issue in 1985 in *MCI* v. *FCC* and the court there had "explicitly reserved holding on the permissive detariffing scheme," the D.C. Circuit now interpreted its decision in that case as invalidating the FCC's permissive detariffing policy as well as mandatory detariffing. 93-356 Pet. App. 53a. The court noted that in the 1985 decision the court had interpreted "modify" in Section 203(b)(2) as authorizing the Commission to make only "circumscribed alterations" in the requirements of Section 203. 93-356 Pet. App. 53a, quoting *MCI* v. *FCC*, 765 F.2d at 1192.

In the appeal arising from the adjudicatory proceeding, the court held that authority "to change in incidental or subordinate features" does not permit the Commission to relieve telephone companies "of the obligations to file tariffs under section 203(a)." 93-356 Pet. App. 53a (quoting *MCI* v. *FCC*, 765 F.2d at 1192).

AT&T sought review of the *Rulemaking Order* in the D.C. Circuit, and asked for summary reversal in light of the court's decision in the adjudicatory proceeding. The court of appeals granted AT&T's motion, stating that its decision in the adjudicatory proceeding "conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of the Communications Act." 93-356 Pet. App. 2a. Neither in that order, nor in its decision in the adjudicatory proceeding (see *id.* at 53a-54a), nor in its 1985 decision in *MCI* v. *FCC* (see 765 F.2d at 1191-1193) did the court respond to the FCC's arguments (1) that Section 203(b)(2) authorizes the Commission to alter "any requirement" of Section 203; (2) that Section 203(c) contemplates the provision of service without a tariff; or (3) that Congress enacted TOCSIA against the background of permissive detariffing. In addition, the court understood "fully why the Commission wants the flexibility to apply the tariff provisions of the Communications Act to AT&T * * * differently from the way it applies the tariff provision to other competing carriers," and it did "not quarrel with the Commission's policy objectives." 93-356 Pet. App. 54a. The D.C. Circuit based its decisions entirely on its conclusion that "modify" in Section 203(b)(2) authorizes only "circumscribed

alterations" of the requirements of Section 203. 93-356 Pet. App. 53a (quoting 765 F.2d at 1192).

5. MCI had filed a petition for a writ of certiorari seeking review of the D.C. Circuit's decision in the adjudicatory proceeding. The government opposed that petition, arguing that review would be premature until the court of appeals had the opportunity to review the *Rulemaking Order* and fully consider the Commission's justifications for its permissive detariffing policy. This Court denied MCI's petition in the adjudicatory proceeding. *MCI Telecommunications Corp.* v. *AT&T*, 113 S. Ct. 3020 (1993). After the D.C. Circuit summarily reversed the Commission's *Rulemaking Order*, the Court granted petitions for certiorari filed by MCI and the government.

SUMMARY OF ARGUMENT

Section 203(b)(2) broadly authorizes the Commission to "modify any requirement" of Section 203. "Modify" has at least two meanings—"to make minor changes in" or "to make basic or fundamental changes in." *Webster's Ninth New Collegiate Dictionary* 763 (1988). While the first definition is consistent with the D.C. Circuit's interpretation of Section 203(b)(2), the second definition is consistent with the Commission's reading of the statute. But the Commission's reading is preferable because it gives force to the phrase "any requirement." Under the D.C. Circuit's reading of "modify," the Commission may modify only "some" of the requirements of Section 203, not "any" requirement. Indeed, AT&T argues that the Commission may modify only requirements relating to "details" such as the form of tariff filings. Br. in Opp. 16. That constricted reading is not consistent with the broad language of Section 203(b)(2).

The Commission's reading of Section 203(b)(2) is also supported by Section 203(c), which states that "[n]o carrier, unless otherwise provided * * * under authority of this chapter," may offer telephone service in the absence of a tariff. That plainly envisions that the Commission has authority to "provide otherwise" and allow telephone companies to offer service without filing a tariff.

In addition, Congress enacted the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) against the background of permissive detariffing, and that amendment to the Communications Act makes little sense if the Commission lacks authority to make the filing of tariffs optional. Congress enacted TOCSIA to require the filing of streamlined tariffs in limited circumstances involving the provision of operator services to guests of hotels and other institutions. S. Rep. No. 439, 101st Cong., 2d Sess. 23 (1990). Under AT&T's view, however, TOCSIA did not have that effect, but may impose duplicative tariff-filing requirements.

Contrary to AT&T's principal contention, its position is not supported, much less compelled, by *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990). That case presented the question whether the Interstate Commerce Commission could excuse a trucker's deviation from rates that had been filed under the Interstate Commerce Act—not, as here, the question whether the requirement to file rates could be excused. Although the Interstate Commerce Act contains a provision that is similar to (but more limited than) Section 203(b)(2), it was undisputed that the provision authorizing the ICC to "change the other requirements of this section" (49

U.S.C. 10762(d)(1)) did not authorize the ICC to change the requirement that truckers follow their filed rates because that requirement is contained in a different Section of the Interstate Commerce Act. Thus, *Maislin* involved a different issue decided under a different statute. The Communications Act is similar in some respects but different with respect to the issue presented here.

The Commission's findings show that permissive detariffing has played a major role in encouraging competition in the long distance market. 93-356 Pet. App. 29a-30a, 54a. That achievement advances the Communication Act's broad purpose of promoting "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. 151.

The Commission's interpretation of Section 203 (b)(2) is entitled to deference. Indeed, this case parallels *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992), where the Court recognized that "[t]he existence of alternative dictionary definitions * * * indicates that the statute is open to interpretation" and deferred to the agency's construction. Moreover, the Communications Act is a "supple instrument" (*FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)) that grants broad discretion to the Commission with respect to numerous matters. It would be inconsistent with the statutory scheme to confine the term "modify any requirement" to the limited construction urged by AT&T.

ARGUMENT

CONGRESS AUTHORIZED THE FEDERAL COMMUNICATIONS COMMISSION TO MAKE THE TARIFF-FILING REQUIREMENT OPTIONAL FOR TELEPHONE COMPANIES LACKING MARKET POWER

The FCC's permissive detariffing policy has played a major role in fostering a competitive long distance market, and thus has promoted Congress's goal of fostering "efficient * * * service * * * at reasonable charges." 47 U.S.C. 151. The 1934 Congress that enacted the Communications Act could not have foreseen the technological advances that made competition feasible in the telecommunications market, but that Congress did not put the Federal Communications Commission in a regulatory straightjacket. Congress in 1934 not only provided for tariffs in order to restrain AT&T, which then had a monopoly over long distance service, but also, in Section 203(b)(2), granted the Commission broad authority to "modify any requirement made by or under the authority" of Section 203, the provision that established the tariff-filing requirement. The D.C. Circuit erred by invalidating the permissive detariffing policy, and thus removing "a cornerstone of the Commission's regulatory regime." 93-356 Pet. App. 8a.

A. Section 203(b)(2) Authorizes The Commission To "Modify Any Requirement" of Section 203, Including The Tariff-Filing Requirement

Section 203(b)(2) authorizes the FCC, "in its discretion and for good cause shown," to "modify any requirement made by or under the authority of this section either in particular instances or by general

order applicable to special circumstances or conditions." That is broad language: It grants the Commission discretion, it extends the modification power to "any" requirement of Section 203, and it authorizes modification either in individual cases or through general rules. And while Section 203(b)(2) speaks of "good cause" and of rules "applicable to special circumstances or conditions," the D.C. Circuit did not dispute that there is good reason for the Commission's permissive detariffing rules or that the introduction of competition into the long distance market is a special circumstance that was not foreseen in 1934. The only limit Congress has placed on the authority granted by Section 203(b)(2) is that the Commission "may not require the notice period [for changing tariff schedules] to be more than one hundred and twenty days." 47 U.S.C. 203(b)(2) (Supp. III 1991). The court of appeals, however, read "modify" in Section 203(b)(2) as granting only the "limited authority" to make "'circumscribed alterations.'" 93-356 Pet. App. 53a, quoting *MCI* v. *FCC*, 765 F.2d at 1192, quoting *Black's Law Dictionary* 905 (5th ed. 1979).

The D.C. Circuit's narrower reading of "modify" overlooks broader definitions of the same term in other dictionaries and, indeed, is not compelled by the dictionary on which the court relied. *Webster's*, for example, alternatively defines "modify" to mean "to make minor changes in" *or* "to make basic or fundamental changes in, often to give a new orientation to or serve a new end." *Webster's Ninth New Collegiate Dictionary* 763 (1988). And *Black's*, on which the court relied, primarily defines "modify" as "to alter," which means "to make a change in." *Black's Law*

Dictionary, *supra*, at 71. The FCC's permissive detariffing policy fits within that definition or the alternative definition given in *Webster's*.

In adopting its interpretation of the FCC's authority to modify the requirements of Section 203, the court of appeals focused on Section 203(a)'s requirement that "*Every* common carrier, except connecting carriers, *shall* * * * file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers * * * and showing the classifications, practices, and regulations affecting such charges." See *MCI* v. *FCC*, 765 F.2d at 1191. The court noted that "'[s]hall' * * * is the language of command" (*ibid.*) and concluded in this case that the FCC may not modify the tariff-filing requirement. The court failed to address, however, to *whom* Section 203(a) directs its command. Clearly, a telephone company may not exempt itself from the tariff-filing requirement of Section 203(a) and, in the absence of an order from the Commission modifying that requirement, "shall" file tariffs. But the Commission, whose authority is derived from Section 203(b)(2), does not face the same limitations and is not subject to any such language of command. Moreover, since five of the six sentences in Section 203 other than Section 203(b)(2) contain the verb "shall," and Section 203(b)(2) authorizes modification of the provisions of Section 203 only, Section 203(b)(2) would have little use unless it authorized the Commission to modify commands that would otherwise be imposed on telephone companies. Indeed, Section 203(b)(2) would have no substantial effect since the one sentence that does not contain "shall" grants the Commission

discretion by providing that "[t]he Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date." 47 U.S.C. 203(d). See also *Permian Basin Area Rate Cases*, 390 U.S. 747, 786-787 (1968) (upholding a decision by the Federal Power Commission to relieve small natural gas producers "from various filing and reporting obligations" that were imposed "without exception or qualification," pursuant to a provision authorizing the agency to "'prescribe different requirements for different classes of persons or matters'") (quoting 15 U.S.C. 717(*o*)).

The court of appeals also failed to appreciate that Section 203(b)(2) explicitly authorizes the Commission to modify "any" requirement of Section 203. The primary requirement of Section 203 is that telephone companies must file tariffs. If the authority to "modify any requirement" has meaning with respect to the tariff-filing requirement, it authorizes the Commission to relieve some carriers of that requirement. Under the D.C. Circuit's reading of "modify," however, relieving carriers of the tariff-filing requirement exceeds the Commission's "limited authority" to make "circumscribed alterations." 93-356 Pet. App. 53a (quoting *MCI* v. *FCC*, 765 F.2d at 1192). The D.C. Circuit's interpretation thus allows the Commission to modify only *some* of Section 203's requirements: specifically, those rules pertaining to minor details. The statutory text, however, mandates that the FCC be allowed to modify *any* requirement of Section 203.

For that reason, the Commission's reading of Section 203(b)(2) is more faithful to the statutory text

than the D.C. Circuit's reading. Although "modify" may have two meanings—"to make minor changes" *or* "to make basic or fundamental changes" (*Webster's, supra*, at 763)—by choosing the more limited meaning, the D.C. Circuit has read the word "any" out of the statute. In fact, the Commission may hardly modify Section 203 at all under the D.C. Circuit's reading, since the tariff-filing requirement of Section 203(a) is off limits and the requirement of Section 203(c) that telephone companies provide service only in accordance with tariffs presumably may not be modified either. Under the Commission's reading of "modify," in contrast, "any" means what it says. Thus, although "modify" might reasonably be construed in other contexts to grant only the power to make "circumscribed alterations," that construction is not tenable here, where such a limited meaning nullifies the remainder of the statutory phrase.

Moreover, the court of appeals misconstrued the scope of the Commission's action. Permissive detariffing does not, as the court of appeals described it, mark the "wholesale abandonment or elimination" of Section 203(a)'s tariff-filing requirement. See 978 F.2d at 736. Rather, it does no more than "alter in the direction of moderation or lenity" the regulatory burden imposed upon a subset of telephone companies. See 6 *Oxford English Dictionary* 576, entry 2 (1933 & reprint 1978). Dominant carriers comprising 99% of the interstate access market (local exchange carriers) and 60% of the interstate, domestic long-distance market (AT&T) still must file tariffs for all their services. Non-dominant carriers themselves *may* file tariffs for all their services, and they *must* continue to file tariffs for their international long-distance

services. See *International Competitive Carrier Policies*, 102 F.C.C.2d 812 (1985). And the Commission retains the power to "reimpos[e] * * * the tariff filing requirement" in the "unlikely event" that market forces and the complaint process do not adequately protect the public interest. *Second Report*, 91 F.C.C.2d 59, 70 (1982); see 93-356 Pet. App. 27a-28a. Thus, even if, as the court of appeals believed, the Commission's authority to "modify" the tariff-filing requirement would not allow it to eliminate that requirement altogether, the Commission's action here should be upheld.

B. Section 203(c), Which Prohibits Untariffed Telephone Service "Unless Otherwise Provided * * * Under Authority Of This Chapter," Supports The Commission's View That It May Authorize Untariffed Service

The Commission's interpretation of the phrase "modify any requirement" is supported by Section 203(c), which explicitly anticipates that the Commission may authorize carriers to provide untariffed service. The first clause of Section 203(c) provides that "[n]o carrier, *unless otherwise provided* by or *under authority of this chapter*, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder." 47 U.S.C. 203(c) (emphasis added). That plainly envisions that, "under authority" of the Communications Act, the FCC may relieve telephone companies of the tariff-filing requirement. In our view, such authority is granted by Section 203(b)(2).

AT&T has advanced three arguments in support of its contention that Section 203(c) does not support the

Commission's interpretation of "modify any requirement." First, AT&T notes that, following the language quoted above, Section 203 goes on to prohibit the charging of rates other than those filed in tariffs. "This clause is unqualified," AT&T claims. Br. in Opp. 16. But that is not so. The clause to which AT&T refers, Section 203(c)(1), prohibits the charging of rates other than those specified "in any such schedule," which in itself contemplates that there might or might not be a tariff. Indeed, the clause prohibiting the charging of rates other than those specified "in any such schedule" is part of the sentence prohibiting telephone service in the absence of tariffs "unless otherwise provided by or under authority of this chapter" and should be read in light of that clause. Thus, the language in Section 203(c) on which AT&T relies more reasonably is interpreted to mean that if a telephone company files a tariff, it may not charge "a greater or less or different" rate.

Second, AT&T argues that the phrase unless "otherwise provided by or under authority of this Act" does not refer to Section 203(b)(2), but instead refers to two other provisions of the Act. Br. in Opp. 16 n.14. One of those provisions is Section 203(a), which states that "connecting carriers" are not required to file tariffs. The other is 47 U.S.C. 211, which requires telephone companies to file copies of their contracts with other telephone companies, but also authorizes the Commission to grant exceptions to that requirement. While the "unless otherwise provided" clause in Section 203(c) may refer to those two provisions as well as to Section 203(b)(2), AT&T has advanced no reason why the phrase should apply to Sections 203(a) and 211 but not to Section

203(b)(2)—which, as we have explained, expressly authorizes the Commission to "modify any requirement" of Section 203.

AT&T also finds support in the portion of Section 203(c) stating that, "unless otherwise provided," telephone service may be furnished only if tariffs have been filed and published "in accordance with the provisions of this Act and with the regulations made thereunder." That shows, in AT&T's view, that the phrase "unless otherwise provided" in Section 203(c) does not address what AT&T terms "the core [tariff] filing requirements," but only "details." Br. in Opp. 16. That is hardly the most natural reading of the phrase. It is more naturally read as authorizing the Commission to modify the filing requirement, the publication requirement, and the secondary requirements relating to filing and publication.

C. Congress Has Amended The Communications Act With The Understanding That Non-Dominant Telephone Companies Are Not Required To File Tariffs

The Commission also noted in the order at issue in this case that "Congress has demonstrated its awareness of the Commission's forbearance policy and made no attempt to disturb it." 93-356 Pet. App. 23a. As the Commission explained, in the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), Congress responded to consumer complaints about a class of non-dominant carriers providing "alternative operator services" (AOS). Congress found that AOS companies were paying hotels and other institutions a percentage of their revenues if the institution would route all calls starting with a "0" through them. Moreover, the

caller would not necessarily know that the call was being handled by the AOS (which might accept a calling card number issued by another company) until the caller received a bill, which might be "several times higher than the prices charged by AT&T." *Id.* at 3. Congress determined that some AOS companies had been "tak[ing] advantage of the customer's captive status" in hotels and other institutions and "engaging in deceptive and unreasonable practices." *Id.* at 2.

In response, Congress enacted, among other provisions, 47 U.S.C. 226(h)(1)(A) (Supp. III 1991), which requires each AOS provider to file "an informational tariff specifying rates." The Senate Report recognized that "AOS carriers are considered 'non-dominant' carriers" and that "[t]he FCC has chosen to 'forbear' from regulating the rates of 'non-dominant' carriers because they do not possess market power and thus have little ability to charge unjust or unreasonable rates." S. Rep. No. 439, 101st Cong., 2d Sess. 3 & n.10 (1990). Congress did "not expect that these informational tariffs would require the same amount of supporting documentation as required of most dominant carriers," and it authorized the FCC to waive the informational tariff requirement after a few years. *Id.* at 23; 47 U.S.C. 226(h)(1)(B).

Thus, Congress acted "upon a baseline of forbearance." 93-356 Pet. App. 25a. Moreover, what it enacted would make little sense in the absence of permissive detariffing. The informational tariffs required under TOCSIA "substantially overlap in scope and purpose the tariff filings provided for in Section 203." *Id.* at 23a. For instance, Section 226(h)(1)(A) provides that AOS providers "shall file

* * * an informational tariff specifying rates, terms, and conditions" for operator services, while Section 203(a) requires common carriers to file tariffs that include "charges" and "classifications, practices, and regulations affecting such charges." See 93-356 Pet. App. 23a-24a. And while Congress expected the informational tariffs filed under Section 226 to be less burdensome than the tariffs required to be filed under Section 203(a), it also required AOSs to provide some information that Section 203 does not require, as AT&T has stressed. Br. in Opp. 18 n.16. But if permissive detariffing is not authorized by Section 203(b)(2), then the net effect, which would be directly contrary to Congress's expressed intention, may be that common carriers acting as AOSs must comply with both Section 203(a) and Section 226(h) (Supp. III 1991), so that tariffing burdens would be increased. Alternatively, it may be that, under AT&T's view, common carriers providing alternative operator services need only file the streamlined tariffs required under Section 226 while that tariffing requirement is in effect. But that alternative would appear to undermine the Commission's authority to waive the Section 226 requirement, expressly conferred by the 1990 amendment, since the common carriers presumably would then have to file more burdensome tariffs under Section 203 with respect to alternative operator services. That is, a conclusion that tariffs are no longer needed for AOS providers would trigger the imposition of more burdensome tariffing requirements, unless the Commission is authorized to relieve common carriers of the requirement that tariffs be filed under Section 203(a) or modify the requirements of those tariffs to a significant extent.

AT&T also emphasizes (Br. in Opp. 18 n.16) that Section 226 does not apply only to common carriers that are subject to Section 203(a), but also to some "other person[s] determined by the Commission to be providing operator services." 47 U.S.C. 226(a)(9) (Supp. III 1991). However, while the Commission has authority to subject some persons to Section 226 that are not governed by Section 203, TOCSIA clearly was designed to address a problem created by a narrow class of non-dominant long distance companies whose rates for captive customers were not disclosed in any tariff. S. Rep. No. 439, *supra*, at 2 n.3. But Congress did not indicate that it was requiring common carriers such as MCI and Sprint to make largely duplicative filings with respect to alternative operator services or that it thought that those carriers would have to comply with Section 203(a) if the Section 226 tariff were waived by the FCC. Congress thought that those companies were not required to file tariffs on account of the Commission's permissive detariffing policy, and Congress enacted Section 226(h) (Supp. III 1991) in order to require them to file streamlined tariffs with respect to alternative operator services.

Particularly since the language of Section 203 will "bear the interpretation adopted by the agency" (*Sullivan* v. *Everhart*, 494 U.S. 83, 92 (1990)), Congress's acquiescence in permissive detariffing, while amending the statute in other respects, confirms the reasonableness of the FCC's interpretation of its authority. See *Young* v. *Community Nutrition Inst.*, 476 U.S. 974, 983 (1986) ("'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one

intended by Congress.' *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)."); see also *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990); *United States* v. *Riverside Bayside Homes, Inc.*, 474 U.S. 121, 132, 137 (1985); *United States* v. *Rutherford*, 442 U.S. 544, 554 & n.10 (1979). Moreover, this Court has recognized the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988). Under that rule of construction, TOCSIA should not be interpreted together with the Communications Act of 1934 to subject common carriers providing alternative operator services to tariffing requirements under both Section 203 and Section 226.

AT&T also has noted Congress's recent amendment of 47 U.S.C. 332(c)(1)(A) granting the FCC authority to limit the tariff-filing requirements for commercial mobile carriers, which include most providers of cellular services. See *Notice of Proposed Rulemaking*, 8 F.C.C. Rcd. 7988, 7996 (1993). AT&T suggests that the 1993 amendment shows that Congress does not think that the Commission has authority under Section 203(b)(2) to modify the tariff-filing requirement. Br. in Opp. 17. To the contrary, the 1993 amendment of Section 332(c) does not support AT&T's position. As part of the Omnibus Budget Reconciliation Act of 1993, Congress amended the Communications Act to establish "uniform rules to govern the offering of all commercial mobile services." H.R. Rep. No. 111, 103d Cong., 1st Sess. 259 (1993). Congress stated that it was "aware that the Commission's long-standing policy of permissive detariffing, applied to non-dominant carriers, was

recently found to be outside the scope of the Commission's authority under Section 203 of the Communications Act" by the D.C. Circuit. *Id.* at 260. Congress accordingly granted the Commission express authority, with respect to the problem it was dealing with at the time, to "'specify' which provisions of Title II of the Communications Act are not applicable to persons engaged in the provision of commercial mobile services," so that the Commission could reinstate the permissive detariffing policy with respect to those persons despite the D.C. Circuit's decision. *Ibid.* That hardly shows congressional hostility toward the Commission's permissive detariffing policy. Nor does the rule that statutes should be interpreted to make sense in combination support AT&T's position, since the amendment to Section 203(c)(1) and the Commission's permissive detariffing policy are harmonious. Indeed, what the 1993 amendment shows is congressional disapproval of the D.C. Circuit's decision, as applied to the problem Congress was addressing.

D. The Commission's Permissive Detariffing Policy Is Consistent With This Court's Decision In *Maislin*

Although the D.C. Circuit cited this Court's decision in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), in a footnote and said that its decision was "somewhat buttressed" by that case (93-356 Pet. App. 53a n.12), AT&T has placed primary reliance on *Maislin*. Br. in Opp. 9-14. That reliance is misplaced. In *Maislin*, this Court held that the Interstate Commerce Commission could not excuse a trucker's deviation from its filed rates. Thus, *Maislin* involved a different issue (whether

truckers must follow rates that have been filed, rather than whether the FCC may relieve non-dominant long-distance companies from filing tariffs) decided under a different statute (the Interstate Commerce Act rather than the Communications Act).

Nor does closer analysis suggest that *Maislin* compels—or even supports—AT&T's position. AT&T argues that the Interstate Commerce Act sets out requirements that are comparable to those in Section 203 of the Communications Act: Truckers must file tariffs (49 U.S.C. 10762(a)) and may not provide service except at the rate specified in the applicable tariff (49 U.S.C. 10761(a)), and 49 U.S.C. 10762(d)(1) provides that the ICC "may change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances." Section 10762(d)(1), the provision that is similar to Section 203(b)(2) of the Communications Act (though not as broad, since it does not provide that the ICC may modify "any" requirement and does not authorize modification "by general order"), was not at issue in *Maislin*. That is because the structure of Section 203 of the Communications Act differs from the structure of Sections 10761 and 10762 of the Interstate Commerce Act. The modification provision of the Interstate Commerce Act, Section 10762(d)(1), authorizes the ICC to change the other requirements "of this section"—that is, Section 10762. Although the filing requirement is set out in Section 10762(a), the requirement that truckers follow the tariffs they have filed is set out in another Section, Section 10761(a), so Section 10762(d)(1) does not authorize the ICC to modify that requirement. Accordingly, the ICC did not argue in *Maislin* that

Section 10762(d)(1) gave it authority to modify the requirement that was at issue in *Maislin*. Section 10762(d)(1) was mentioned in the Court's decision only in a footnote relating to a tangential point. See 497 U.S. at 134 n.14. Accordingly, as the FCC explained (93-356 Pet. App. 16a), *Maislin* "is not dispositive here."

In addition, the Commission noted (93-356 Pet. App. 17a-18a) that the Court in *Maislin* had relied on an amendment to the Interstate Commerce Act that allowed the ICC "to exempt motor *contract* carriers from the requirement that they adhere to the published tariff, see 49 U.S.C. § 10761(b) (1982 ed.), demonstrating that Congress is aware of the requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers." 497 U.S. at 135. Here, in contrast, TOCSIA supports the FCC's view that Congress is aware of permissive detariffing and has premised an amendment of the Communications Act on the FCC's permissive detariffing policy. 93-356 Pet. App. 18a.[1]

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[1] There are, moreover, differences in the regulatory policies underlying the tariff-filing requirements in the two industries. The Communications Act of 1934 was enacted in the context of AT&T's almost complete monopoly power over the telephone industry. See S. Rep. No. 781, *supra*, at 2; 78 Cong. Rec. 10,315 (1934) ("[t]he competition in the industry will run about as follows: Telephone: American Telephone & Telegraph Co., 95 percent of the business; 100 independent companies, 5 percent of the business") (statement of Rep. Rayburn). Accordingly, Congress required AT&T to file tariffs to provide the FCC with the information needed to ensure that the monopoly charged only reasonable rates. See 78 Cong. Rec. 10,315 (1934) (statement of Rep. Rayburn). Collective ratemak-

E. Permissive Detariffing Implements Congress's Goals In Enacting the Communications Act

As the Commission noted when it initiated its review of the effects of the tariff-filing requirement on non-dominant carriers in 1979, three-quarters of the challenges to tariffs came from competitors rather than customers. The Commission accordingly concluded that "it is apparent that these petitions are being used by competitors as a dilatory tactic to postpone commencement of service or rate changes by

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ing by competitors has never been authorized under the Communications Act.

By contrast, collective ratemaking was authorized and utilized in the transportation industry under the Motor Carrier Act of 1935, 49 Stat. 543. See *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 66, 70 (1985) (Stevens, J., dissenting) ("Congress * * * decided, as a matter of policy, that some price fixing should be permitted in the transportation industry, and enacted the Reed-Bulwinkle Act of 1948 to effectuate that policy choice"); *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80-84 (1944) (detailing Congress's efforts to limit competition in the transportation industry).

Accordingly, rules developed in the context of the transportation industry should not necessarily be applied to the communications industry. See *United States* v. *American Union Transport, Inc.*, 327 U.S. 416, 455 (1946) (declining to construe language in the Shipping Act in light of similar language in the Interstate Commerce Act on account of "the quite different wording, coverage, history and, to some extent, policy of the Shipping Act"); *General Telephone Co.* v. *United States*, 449 F.2d 846, 856 (5th Cir. 1971) ("[w]hile the similarities between the two sections [47 U.S.C. 214 and Section 1(18) of the Interstate Commerce Act] are unquestionable, it must be emphasized that the functions of the Interstate Commerce Commission * * * are entirely different than those of the Federal Communications Commission").

competing carriers." *Competitive Carrier*, 77 F.C.C.2d 308, 314 (1979). After further study, the FCC concluded in 1981 that "the requirement that firms post their prices makes it difficult for those same firms to bargain with their customers over rates or to adjust them quickly to market conditions." *Further Notice of Proposed Rulemaking*, 84 F.C.C.2d 445, 454 (1981). In particular, the Commission stated, tariff filings make it difficult to provide discounts that would otherwise be offered. *Ibid.* Moreover, by filing petitions objecting to the tariffs, competitors may impose "substantial legal costs" on firms that offer discounts. *Ibid.* The expenses caused by tariffs are particularly burdensome on new entrants to the market, the Commission found. *Id.* at 453.

The Commission further concluded that "[t]ariff posting also provides an excellent mechanism for inducing noncompetitive pricing." 84 F.C.C.2d at 454. The Commission explained that the tariff-filing requirement makes all price reductions public, which means that "they can be quickly matched by competitors," thus "reduc[ing] the incentive to engage in price cutting" in the first place. *Ibid.* The Commission concluded that regulated competition pursuant to tariffs "all too often becomes cartel management." *Ibid.* Moreover, the Commission continued, the original justification for tariffing under the Communications Act—preventing a monopolist from extracting excessive profits—does not apply to firms lacking market power, since "non-dominant firms are unable to do what the rules are designed to prevent them from doing anyway." *Id.* at 454-455. In short, "[a]pplying the tariff requirements to competitive entities * * * has worked the perverse effect of

imposing a measure which (1) is superfluous as a consumer protection device, since competition circumscribes the prices and practices of these companies, and (2) stifles price competition and service and marketing innovation." *Id.* at 478-479. See *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80 (1979) (duty of affirmative disclosure of prices may frustrate competitive bidding and lead to price matching and anticompetitive cooperation among sellers).

Thus, once entrants to the telecommunications market had begun to transform that market from a monopoly to competition, the Commission's policy of detariffing was essential to fulfilling its statutory charge to ensure "rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. 151. Failing to modify the tariff-filing requirement in light of the market changes would have been inconsistent with Congress's goals. Accordingly, the Commission issued a "general order" under Section 203(b)(2) exempting carriers in "special circumstances," *i.e.*, lacking market power, from the tariff-filing requirement.

The Commission's detariffing policy has been a notable success in achieving its statutory charge to deliver "rapid, efficient * * * communications service with adequate facilities at reasonable charges." 47 U.S.C. 151. Upon reviewing its policy in 1992, the Commission concluded that the evidence introduced in the rulemaking proceeding confirmed the findings it had made 11 years earlier. From 1982 to 1992, the number of long distance carriers had increased from about 12 to about 482. 93-356 Pet. App. 30a. And the

market had become more competitive—while AT&T remained dominant, its share of the market had declined from 80% to 60%. *Id.* at 31a. The evidence specifically showed that the permissive detariffing policy had played a major role in fostering competition in the long distance market. Some non-dominant carriers testified that the absence of tariffing requirements had allowed them to enter "niche markets" for the provision of long distance service to businesses, and that they "likely would not have entered into the competitive fray at all" had they been subjected to tariffing. *Id.* at 29a & n.113. The Commission concluded, as a policy matter, "that the purposes of the Act would be thwarted if the Commission were to reimpose full tariff regulations on competitive, nondominant carriers." *Id.* at 29a. The court of appeals did not quarrel with that conclusion. *Id.* at 54a.[2]

At the same time, the Commission has not relieved any telephone company of the requirements that rates be just and reasonable (47 U.S.C. 201(b)), and not unreasonably discriminatory (47 U.S.C. 202(a)). See *Rulemaking Order*, 7 F.C.C. Rcd. 8072, 8079 (1992). The FCC retains its powers to investigate and

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[2] As for AT&T, the Commission in a recent rulemaking proceeding streamlined the tariffs it must file on account of the development of competition in the interstate long distance market. *Interexchange Rulemaking*, 6 F.C.C. Rcd. 5880 (1991), reconsidered, 7 F.C.C. Rcd. 2677 (1992), petition for review pending, 93-1306 (D.C. Cir.). However, because AT&T remains dominant in that market and AT&T's share of some important submarkets (such as 800 service) continues to be large enough to give it an advantage over its competitors with respect to other services, the Commission retained the tariff-filing requirement for AT&T.

prescribe all carriers' rates, and to order refunds in some circumstances. 47 U.S.C. 205 (1988 & Supp. III 1991); see *New England Tel. & Tel. Co.* v. *FCC*, 826 F.2d 1101 (D.C. Cir. 1987), cert. denied, 490 U.S. 1039 (1989). The FCC also remains open to adjudicate complaints that a non-dominant (as well as dominant) carrier's rates are unlawful, and to require such carriers to pay damages or to cease and desist from unlawful conduct. 47 U.S.C. 207-209. In such a proceeding concerning the lawfulness of untariffed rates, discovery procedures are available to obtain pertinent information. *Rulemaking Order*, 7 F.C.C. Rcd. at 8079 n.108 (citing 47 C.F.R. 1.729-1.730). Thus, although competition should ensure that non-dominant carriers' rates are reasonable, the Commission may respond to abuses that may arise.

F. The Commission's Interpretation Of Section 203 Of The Communications Act Is Entitled To Deference

The court of appeals' ruling conflicts with the "dominant, well-settled principle of federal law" requiring "judicial deference to reasonable interpretations by an agency of a statute it administers." *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1401-1402 (1992); see *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-844 (1984). Under that standard, the first inquiry is whether the statute reveals an "unambiguously expressed intent of Congress" on the "precise question" addressed by the FCC's interpretation. *Chevron*, 467 U.S. at 843. If it does, that ends the inquiry. *Id.* at 842-843. However, "[f]ew phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation

when applied in a real context." *National R.R. Passenger Corp.*, 112 S. Ct. at 1402. "If the agency interpretation is not in conflict with the plain language of the statute, deference is due" (*id.* at 1401), and courts must uphold the agency's construction so long as it is "reasonable" (*Chevron*, 467 U.S. at 844). Such deference recognizes that "the resolution of ambiguity in a statutory text is often more a question of policy than of law," and therefore properly "reflects a sensitivity to the proper roles of the political and judicial branches." *Pauley* v. *Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991); see also *Chevron*, 467 U.S. at 865-866 ("it is entirely appropriate for th[e] political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities").

This case is similar to *National R.R. Passenger Corp.* There, the crucial issue was the meaning of the word "required" in a provision of the Interstate Commerce Act. The D.C. Circuit held that "required" meant "necessary or indispensable" and rejected the ICC's interpretation that it meant "useful or appropriate." 112 S. Ct. 1401-1402. This Court acknowledged that the D.C. Circuit's view was "not without support," but noted that alternative dictionary definitions supported the ICC's construction. *Id.* at 1402. The Court stated that "[t]he existence of alternative dictionary definitions of the word 'required,' each making some sense under the statute, itself indicates that the statute is open to interpretation," and deferred to the ICC's interpreta-

tion of the word. *Ibid.* In this case, as we have explained, "modify" has alternative meanings. In our view, "modify" is better read in the context of the Communications Act as the Commission has read it. But in any event, the Commission's interpretation is at least reasonable, and the Court should uphold the agency's interpretation in this case, just as it did in *National R.R. Passenger Corp.* See also *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, 470 U.S. 116, 126 (1985) (the Court held that "[t]he word 'modify' thus has no plain meaning as used in" an environmental statute, and deferred to the EPA's construction of the term).

Moreover, it does not appear that the D.C. Circuit has adequately considered whether to pay deference to the Commission's interpretation of the word "modify." The 1985 decision concerning mandatory detariffing, in which the court said that modify "suggest[s] 'circumscribed alterations'" (93-356 Pet. App. 53a, quoting 765 F.2d at 1192), did not cite *Chevron* or otherwise discuss deference principles. See 93-356 Pet. App. 52a & n.11. Moreover, the court recognized in 1992 that the Commission's interpretation of "modify" was "not insubstantial when made initially." *Id.* at 52a. In our view, the Commission's interpretation is at least reasonable, and therefore is entitled to deference. AT&T claims that Section 203(b)(2) is "unambiguous" and grants the FCC only the limited power to modify "details" relating to matters such as the "content and form of tariff schedules." Br. in Opp. 16, 17. While we think that claim is unsupportable, it is noteworthy that AT&T recognizes that it should prevail only if this Court concludes that the authority to "modify any require-

ment" of Section 203 unambiguously means what AT&T says it means—that the Commission has authority only to modify details relating to the form of tariff schedules.

The FCC's reading of "modify" also comports with the general breadth of Congress's grant of authority to the Commission under the Communications Act. That Act contains a "necessary and proper" clause (*New England Tel. & Tel. Co.* v. *FCC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987), cert. denied, 490 U.S. 1039 (1989)) comprehensively authorizing the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions" (47 U.S.C. 154(i)). Broadly delegated discretion is apparent, as well, in the common carrier provisions of Title II, 47 U.S.C. 201 *et seq.* For example, Section 204(a) of the Act, 47 U.S.C. 204(a), grants the agency unreviewable discretion to decide whether to suspend and investigate a rate before it takes effect, to investigate the rate without suspension, or simply to let it take effect without either suspension or investigation. See *Aeronautical Radio, Inc.* v. *FCC*, 642 F.2d 1221, 1234-1235 (D.C. Cir. 1980), cert. denied, 451 U.S. 920, 976 (1981); *American Broadcasting Cos.* v. *FCC*, 682 F.2d 25, 30 (2d Cir. 1982); *Maine Public Advocate* v. *FCC*, 828 F.2d 68, 69 (1st Cir. 1987). If the Commission chooses to invoke its authority under Section 204 to suspend and investigate, it has still further discretion in determining whether to order refunds in connection with rates found to be unlawfully high. *Las Cruces TV Cable* v. *FCC*, 645 F.2d 1041, 1047-1048 (D.C. Cir. 1981). And Section 205 of the Act, 47 U.S.C. 205,

grants the FCC "sole discretion" whether or not to prescribe a rate following investigation. *National Association of Motor Bus Owners* v. *FCC*, 460 F.2d 561, 565 (2d Cir. 1972).

In short, Congress vested in the FCC sufficiently flexible powers to carry out—in the face of changing circumstances—the Act's broad purpose of promoting "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. 151. As this Court long ago recognized, the Communications Act is "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); see also *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 172-173 (1968). In this context, it is apparent that Section 203(b)(2) is a similar reflection of Congress's determination to authorize the Commission to adapt the requirements of the Act to changing circumstances. There is no sound reason to believe that in a "supple instrument" containing a "necessary and proper" clause and other grants of broad discretion, Congress simultaneously meant its grant of authority to "modify any requirement" of Section 203 to be limited to the inconsequential authority to alter only details relating to the form of tariff schedules.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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